

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:F:HAR:POSTF-140562-02
SCBest

date: August 27, 2002

to: (b)(7)a [REDACTED], Revenue Agent, LMSB:NR Division, (b)(7)a [REDACTED]

from: Associate Area Counsel, LMSB, Area 1, Hartford, CT

subject: [REDACTED], LLC
Determination of proper TMP

This memorandum responds to your request for advice received in our office on July 22, 2002. This memorandum should not be cited as precedent.

ISSUE

For purposes of soliciting and executing a consent extending the statute of limitations on assessment, who is the proper Tax Matters Partner (TMP) of the [REDACTED], LLC, a TEFRA entity, for the taxable year ending December 31, [REDACTED]? UIL. Nos. 6229.02-00 and 6231.07-00.

CONCLUSION

We agree with your conclusion that [REDACTED] (with [REDACTED] as Trustee) is the proper TMP of [REDACTED], LLC for the taxable year ending December 31, [REDACTED].

FACTS

On or about [REDACTED], [REDACTED] ([REDACTED]), [REDACTED] ([REDACTED]) and [REDACTED] ([REDACTED]), as settlors and apparent beneficiaries, established three separate trusts named [REDACTED] ([REDACTED]), [REDACTED] ([REDACTED]) and [REDACTED] ([REDACTED]), respectively. Each trust agreement recited that each settlor contributed \$[REDACTED] to each trust. The [REDACTED] trust agreement listed [REDACTED], [REDACTED] and a [REDACTED] ([REDACTED]) as Trustees. The [REDACTED] trust agreement listed [REDACTED], [REDACTED] and [REDACTED] as trustees. The [REDACTED] trust agreement listed [REDACTED], [REDACTED] and [REDACTED] as trustees. [REDACTED] is the mother of [REDACTED] and [REDACTED], and [REDACTED] apparently is an attorney who assisted the family in setting up the trusts.

On or about [REDACTED], [REDACTED] LLC (taxpayer), was formed pursuant to the Delaware Limited Liability Company Act, 6 Del. C. §§ 18-201, et seq., with [REDACTED], [REDACTED] and [REDACTED] as its sole members. The LLC operating agreement provided that the taxpayer shall be member-managed and further specified that [REDACTED], [REDACTED] and [REDACTED] had contributed cash or property to the LLC valued at [REDACTED]%, [REDACTED]% and [REDACTED]%, respectively. Article 10.(d) of the LLC operating agreement stated the following:

[REDACTED] shall be the "tax matters partner" of the LLC for purposes of the Code.

On or about [REDACTED], consistent with the statement in Article 10.(d) above, [REDACTED], LLC filed a Form 1065 for the taxable year ending December 31, [REDACTED] designating [REDACTED] in his individual capacity as TMP (he completed the "Designation of Tax Matters Partner" section on the bottom of page 2 of the Form 1065 including his signature, address and social security number). Attached to the Form 1065 were three Schedule K-1s identifying [REDACTED]'s, [REDACTED]'s and [REDACTED]'s profits interest in the taxpayer as [REDACTED]%, [REDACTED]% and [REDACTED]%, respectively.

Revenue Agent (b)(7)a [REDACTED] is presently examining the taxpayer's Form 1065, the [REDACTED] Forms 1041 of the three trusts and the Forms 1040 of [REDACTED], [REDACTED] and [REDACTED]. Consistent with I.R.C. § 6229(b)(1)(A), at the partner level, he solicited and secured Forms 872-I (Consent to Extend Time to Assess Tax As Well As Tax Attributable to Items of a Partnership) from [REDACTED], [REDACTED] and [REDACTED] with respect to the partnership items flowing to their individual Forms 1040 for the [REDACTED] taxable year.

The normal statute of limitations on the [REDACTED] Form 1065 expires on or about [REDACTED]. Concluding that the taxpayer improperly designated [REDACTED] in his individual capacity as its TMP on the [REDACTED] Form 1065, Revenue Agent (b)(7)a [REDACTED] solicited from the taxpayer's representative documentation to establish who was the proper TMP.

On [REDACTED], the existing trustees of each of the three trusts executed separate Forms 56 (Notice Concerning Fiduciary Relationship) appointing "[REDACTED], trustee, to act as agent in dealing with the Internal Revenue Service for all tax matters including, but not limited to signing consents, waivers and extensions for tax years ending December 31, [REDACTED] and December 31, [REDACTED]." On the same date, [REDACTED] as trustee for each of the three trusts executed a Form 56 on behalf of the taxpayer-LLC, designating [REDACTED] as the tax matters partner for the [REDACTED] and [REDACTED] taxable years. By separate letters signed [REDACTED], [REDACTED] as a trustee for each of the three trusts

confirmed, that effective [REDACTED], [REDACTED] resigned as trustee for each trust.

After reviewing the Forms 56 and believing that the taxpayer now properly designated [REDACTED] as its TMP, Revenue Agent Bonanni solicited and received a Form 872-P, signed by "[REDACTED] Revocable Trust, Tax Matters Partner, by [REDACTED], Trustee" extending the statute until June 30, [REDACTED]. He seeks our advice as to whether the Form 872-P is valid.

DISCUSSION

At the outset, we agree that the "small partnership exception" does not apply and the unified audit and litigation procedures of TEFRA govern the [REDACTED] Form 1065 filed by the LLC because each member-partner is a trust. See section 6231(a)(1)(B)¹; Ivory v. United States, 96-1 USTC ¶ 50,078 (S.D. Ohio. 1995); Treas. Reg. § 301.6231(a)(1)-1(a)(2).

Under the TEFRA provisions, the person authorize to execute a consent to extend the section 6229(a) period of limitation on behalf of the partnership is the tax matters partner or any other person authorized by the partnership in writing to enter into such an agreement. See section 6229(b)(1)(B). Under section 6231(a)(7), the tax matters partner is the general partner designated by the partnership in accordance with the regulations, or if there has been no proper designation, the general partner with the largest profits interest in the partnership at the close of the taxable year.

Treas. Reg. § 301.6231(a)(7)-1(b) provides that a person may be designated as the tax matters partner of a partnership for a taxable year only if that person was a general partner in the partnership at some time during the taxable year for which the designation was made or is a general partner in the partnership at the time of the designation. Treas. Reg. § 301.6231(a)(7)-2 provides that for purposes of applying section 6231(a)(7) and Treas. Reg. § 301.6231(a)(7)-1 to an LLC, only a member-manager of an LLC is treated as a general partner and a member other than a member-manager is treated as a partner other than a general partner.

¹ Unless otherwise indicated, all statutory references herein are to the Internal Revenue Code in effect during the years at issue.

In the instant case, in accord with the LLC operating agreement, all three of the trusts are member-managers; hence for purposes of section 6231(a)(7), all three are treated as general partners and each could be designated as a TMP.¹² Here, [REDACTED] in his individual capacity was never a member or a member-manager of the taxpayer. Thus, applying the foregoing authorities, we agree with your conclusion that the taxpayer improperly designated him as TMP on the [REDACTED] Form 1065.

Treas. Reg. § 301.6231(a)(7)-1(e) provides that after a partnership return is filed, the partnership can designate a TMP by filing a statement with the service center with which the partnership return was filed, signed by the general partners holding more than a 50% of the aggregate interests in partnership profits. The statement must also (1) identify the partnership and the designated partner by name, address and taxpayer identification number; (2) specify the partnership taxable year to which the designation relates; and (3) declare that it is a designation of a tax matters partner for the taxable year specified. We believe that the signatures and representations on the Forms 56 dated [REDACTED] filed by the taxpayer and the three trusts qualify as valid statements under Treas. Reg. § 301.6231(a)(7)-1(e) designating [REDACTED] as TMP for the [REDACTED] taxable year.

Finally, even assuming arguendo that the Forms 56 failed to qualify as proper statements, we also agree that as a matter of law, [REDACTED] should be designated as TMP, because pursuant to Treas. Reg. § 301.6231(a)(7)-1 (m), it is the member-manager of the LLC with the largest profits interest whose name appears first alphabetically.

In summary, we believe that Revenue Agent (b)(7)a [REDACTED] acted appropriately in securing the Form 872-P from the LLC and the Forms 872-I from [REDACTED], [REDACTED] and [REDACTED]. Together or separately, these consents adequately extend the "partnership items" of these taxpayers for the [REDACTED] taxable year.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse

¹² We note that in Chomp Associates v. Commissioner, 91 T.C. 1069 (1988), the Tax Court failed to reach an argument raised by the taxpayer that a "pass thru partner" such as a partnership or a trust, could not qualify as a TMP. Under the facts of this case, we see no merit to such an argument. Further, we do not believe that the Service agrees with this position.

effect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

We are closing our file on this matter. You may direct any questions to Stephen C. Best at (860) 290-4074.

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(Large and Mid-Size Business)

By: _____
STEPHEN C. BEST
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